

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

CECILIO P. FABELA,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-05-799-L
)	
RON WARD, WARDEN,)	
)	
Respondent.)	

ORDER

Petitioner, a state prisoner appearing *pro se*, brings this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. This matter is before the court for review of the Report and Recommendation entered by United States Magistrate Judge Valerie K. Couch on January 30, 2006, wherein she recommends that (1) the Petition for Writ of Habeas Corpus [Doc. No. 1] be denied; (2) Petitioner's Motion to Stay Habeas Proceeding Pending Disposition of Petitioner's Motion for Appointment of Counsel [Doc. No. 4] be denied; and, (3) petitioner's Pro Se Motion for Appointment of Counsel [Doc. No. 5] be denied. The Magistrate Judge also recommended that petitioner's request for an evidentiary hearing be denied.

The court file reflects that petitioner filed his Objection to Report and Recommendation which the court has carefully considered. Petitioner also subsequently file a Motion for Leave to Supplement Objection to Report and Recommendation [Doc. No. 17]. In the exercise of its discretion, the court grants

petitioner's motion and has carefully considered his Supplement to Objection to Report and Recommendation. The court notes, however, that the "recent" Supreme Court decision petitioner refers to in his supplement, Johnson v. California, 125 S.Ct. 2410, 2416 (2005), was actually cited by the Magistrate Judge in her Report and Recommendation. The court rejects petitioner's argument that consideration of this case would alter the recommendations of the Magistrate Judge in this matter.

The well-reasoned and comprehensive Report and Recommendation contradicts petitioner's allegations that the Magistrate failed to acknowledge or address many of his arguments. To the contrary, the Report and Recommendation demonstrates that the Magistrate Judge carefully considered petitioner's objections, ultimately properly determining he is not entitled to the relief requested.

The Magistrate Judge properly found that petitioner's habeas claims based on Batson challenges are foreclosed by the Tenth Circuit's decision in Saiz v. Ortiz, 392 F.3d 1166 (10th Cir. 2004), *cert. denied*, 1255 S.Ct 2976 (2005). Regarding petitioner's claim based on alleged errors in jury instructions, the court finds that the Magistrate Judge properly found that the Oklahoma Court of Criminal Appeals' (OCCA's) adjudication of this issue did not result in a decision contrary to or an unreasonable application of Supreme Court precedent. Thus, federal habeas relief is unwarranted on this claim. The Magistrate Judge properly

rejected petitioner's claim based on cumulative error, finding that the OCCA's determination as to this issue is subject to deference, particularly in light of the strong evidence of petitioner's guilt. Noting that petitioner was sentenced in accordance with the permissible sentencing range provided by Oklahoma law, the Magistrate properly recommended that petitioner's claim based on excessive sentence should be denied. Petitioner's objection is insufficient to overturn the conclusion of the Magistrate Judge that petitioner has failed to establish that his trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment. The Magistrate Judge's analysis and conclusions on this point were proper and were based upon an extremely thorough review of the record. The Magistrate Judge's findings that petitioner's claim based on ineffectiveness of appellate counsel are likewise well supported by the record and controlling legal authority. Regarding petitioner's objections to the recommended disposition of his pending motions, the court determines that they are not sufficient to overcome the well-supported conclusions of the Magistrate Judge.

Accordingly, having conducted a *de novo* review of the matter, the court finds that the Report and Recommendation should be adopted in its entirety. **The 28 U.S.C. § 2254 Petition for a Writ of Habeas Corpus [Doc. No. 1] is DENIED. In keeping with the recommendations of the Magistrate Judge, Petitioner's Motion to Stay Habeas Proceeding Pending Disposition of Petitioner's Motion for Appointment of Counsel [Doc. No. 4] is denied;**

petitioner's Pro Se Motion for Appointment of Counsel [Doc. No. 5] is denied. Petitioner's request for an evidentiary hearing is also denied. As stated above, petitioner's Motion for Leave to Supplement Objection to Report and Recommendation with Supreme Court Authority [Doc. No. 17] is granted, however, for the reasons stated above, his objections to the Report and Recommendation are overruled.

It is so ordered this 15th day of March, 2006.



TIM LEONARD
United States District Judge